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11 **UNITED STATES BANKRUPTCY COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14 **In re:**

15 **PG&E CORPORATION**

16 **- and -**

17 **PACIFIC GAS AND ELECTRIC**
18 **COMPANY,**

Debtors.

- 19
- 20 ☐ Affects PG&E Corporation
- 21 ☐ Affects Pacific Gas and Electric Company
- 22 ☒ Affects both Debtors

23 ** All papers shall be filed in the Lead Case,*
No. 19-30088 (DM).

Case No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

STATEMENT OF THE OFFICIAL
COMMITTEE OF UNSECURED
CREDITORS REGARDING CROSS-
MOTIONS FOR ENTRY OF A
PROTECTIVE ORDER BY
(I) OFFICIAL COMMITTEE OF
TORT CLAIMANTS AND (II) DEBTORS

Date: June 26, 2019
Time: 9:30 a.m. (Pacific Time)
Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Re: Docket Nos. 2419 and 2459

1 The Official Committee of Unsecured Creditors (the “Committee”) of PG&E Corp. and
2 Pacific Gas and Electric Company (collectively, the “Debtors”) respectfully submits this statement
3 regarding both the (i) *Motion of the Official Committee of Tort Claimants for Entry of a Protective*
4 *Order* (the “TCC Protective Order Motion”) [Docket No. 2419] and (ii) *Motion for Entry of*
5 *Protective Order Pursuant to Fed. R. Bankr. P. 7026 and 9014(c) and 11 U.S.C. §105(a)*
6 *Governing Discovery Materials and Other Information* [Docket No. 2459] (the “Debtors’
7 Protective Order Motion” and, together with the TCC Protective Order Motion, the “Cross-
8 Motions”).

9 STATEMENT

10 1. The Debtors, the Committee, and the Official Committee of Tort Claimants (the
11 “TCC”) have agreed to nearly every provision in a 15-page Protective Order governing the
12 exchange of “Discovery Material” in these cases. A single provision in that Order remains
13 disputed, concerning which party—producing or receiving—should inform the Court first about
14 an unresolvable dispute as to whether particular Discovery Material has been appropriately
15 designated as confidential. This is a minor issue that should have been resolved consensually.

16 2. The Debtors solicited comments from the Committee on the form of a proposed
17 protective order several weeks ago, and the Committee’s feedback was largely incorporated.¹ The
18 Committee was apprised of the dispute between the Debtors and the TCC concerning the “Judicial
19 Intervention” provision of the proposed order and remained agnostic. While the Committee views
20 the dispute as immaterial relative to the much more important business of gathering and sharing
21 the information that will be necessary to accurately assess the magnitude of the Debtors’ claims
22 pools and bring these cases to a swift conclusion, the Committee’s limited view on the issue is
23 stated briefly herein.

24
25 ¹ The Committee subsequently proposed an addition to Section 5.4 of the Debtors’ proposed
26 order (“‘CONTRACTOR CONFIDENTIAL’ Material”), affording PG&E Contractors
27 who produce Discovery Material in these cases a parallel right to redact sensitive and
28 proprietary financial information, such as “bidding calculations” or “profit information,”
subject to the challenge procedures set forth in the proposed order. The Debtors are in
agreement with the Committee’s proposed addition and have indicated that they will make
the requested change.

VIEW OF THE COMMITTEE

3. To be clear, the Committee would be agreeable to either articulation of the proposed “Judicial Intervention” provision. But to the extent an issue in dispute is which party shall bear the ultimate burden of proving whether a confidentiality designation is warranted, the Committee believes the burden should lie with the designating party.

4. Each of this District’s model protective order and the majority of the relevant authority, including from this Court, indicate that it is proper for the designating party to bear the burden of proving that challenged confidentiality designations are warranted. In fact, none of the protective orders annexed to either of the competing motions place the ultimate burden of persuasion on the challenging party, and many expressly place the burden on the designating party. *See Declaration of Richard W. Slack in Support of Motion for Entry of Protective Order Pursuant to Fed. R. Bankr. P. 7026 and 9014(c) and 11 U.S.C. Section 105(a) Governing Discovery Materials and Other Information* [Docket No. 2460] (“Slack Decl.”) Ex. B (Stipulated Protective Order, *In re PG&E*, Case No. 01-30923 (May 11, 2001), ECF No. 503) ¶ 10 (“The burden of proving that information has been properly designated as ‘CONFIDENTIAL MATERIAL’ or ‘HIGHLY CONFIDENTIAL/ RESTRICTED MATERIAL’ is on the party making such designation.”); *id.* Ex. D (Stipulated Protective Order, *In re PG&E*, Case No. 01-30923 (May 24, 2001), ECF No. 691) ¶ 10 (same); *id.* Ex. G (Model Stipulated Protective Order for Litigation Involving Patents, Highly Sensitive Confidential Information and/or Trade Secrets, U.S. District Court for the Northern District of California) at 9:10 (“The burden of persuasion in any such challenge proceeding shall be on the Designating Party.”); TCC Protective Order Motion, Exhibit A (Declaration of Lars Fuller), Exhibit 1 (Stipulated Protective Order for Standard Litigation, U.S. District Court for the Northern District of California) ¶ 6.3 (same).²

² The remaining protective orders annexed to the motions are silent on which party bears the burden of persuasion in a challenge proceeding, if indeed a challenge proceeding is contemplated therein. *See id.* Ex. A (Stipulation for Protective Order; Order Thereon, *In re RDIO, Inc.*, Case No. 15-31430 (Jan. 15, 2016), ECF No. 165) ¶ 16 (silent on burden in challenge proceeding); Ex. C (Stipulated Protective Order Regarding Confidential Information, *In re PG&E*, Case No. 01-30923 (May 22, 2001), ECF No. 619) ¶ 17 (silent on burden in challenge proceeding); *id.* Ex. F (Agreed Protective Order, *In re Brobeck, Phleger & Harrison*, Case No. 03-32715-DM7 (Nov. 8, 2004), ECF No. 666) ¶ 10 (silent

1 5. Any counterargument appears to boil down to the notion that these cases are large
2 and complex, and that because discovery is likely to be asymmetric, the Debtors will bear too
3 onerous a burden. *See* Debtors' Protective Order Motion at 4:1-3, 4:20-24, 10:4-6, 10:7-10. But
4 asymmetric discovery is inherent to the nature of discovery in all bankruptcy proceedings.
5 Moreover, even in the previous iteration of this large, complex case, the Court found it proper to
6 place the ultimate burden of persuasion in a challenge proceeding on the designating party. *See*
7 Slack Decl. Ex. B. (Stipulated Protective Order, *In re PG&E*, Case No. 01-30923 (May 11, 2001),
8 ECF No. 503) ¶ 10; *id.* Ex. D (Stipulated Protective Order, *In re PG&E*, Case No. 01-30923 (May
9 24, 2001), ECF No. 691) ¶ 10.

10 6. Notwithstanding the foregoing, the Committee will comply with either form of
11 order that the Court determines to be just and proper.

12
13 Dated: June 19, 2019

14
15 **MILBANK LLP**

16 /s/ Andrew M. Leblanc

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26 on burden in challenge proceeding) *id.* Ex. E (Order Directing Production of Documents
27 to ISO/PX Market Participants Pursuant to Federal Bankruptcy Rule 2004 and Protective
28 Order Respecting Confidentiality of Documents, *In re PG&E*, Case No. 01-30923 (July
11, 2001), ECF No. 1448) ¶ 5.I (contemplates objections to disclosures of designated
material with outside parties, but no confidentiality challenge proceeding contemplated;
silent on burden in disclosure proceedings).